

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 MITCHELL KEITH GOODRUM,

4 Plaintiff

5 v.

6 NUGGET CASINO OWNER JOHN DOES,
7 NUGGET CASINO EMPLOYEE DALLAS
JOHNSON,

8 Defendants
9

Case No.: 3:20-cv-00543-MMD-WGC

**Report & Recommendation of
United States Magistrate Judge**

Re: ECF No. 1-1, 3, 4

10 This Report and Recommendation is made to the Honorable Miranda M. Du, United
11 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28
12 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

13 Plaintiff, who is an inmate incarcerated within the Nevada Department of Corrections
14 (NDOC), has filed an application to proceed in forma pauperis (IFP) (ECF No. 3) and pro se
15 complaint (ECF No. 1-1), as well as a motion or appointment of counsel (ECF No. 4). For the
16 reasons stated below, the IFP application should be granted, and Plaintiff should be required to
17 pay the \$350 filing fee over time; the section 1983 claims should be dismissed with prejudice as
18 there is no state action; the negligence claim should be dismissed for lack of jurisdiction; and the
19 motion for appointment of counsel should be denied as moot.

20 **I. IFP APPLICATION**

21 A person may be granted permission to proceed IFP if the person “submits an affidavit
22 that includes a statement of all assets such [person] possesses [and] that the person is unable to
23

1 pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense
2 or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1).

3 The Local Rules of Practice for the District of Nevada provide: "Any person who is
4 unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP].
5 The application must be made on the form provided by the court and must include a financial
6 affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

7 "[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some
8 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
9 (quotation marks and citation omitted). A litigant need not "be absolutely destitute to enjoy the
10 benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

11 An inmate submitting an application to proceed IFP must also "submit a certificate from
12 the institution certifying the amount of funds currently held in the applicant's trust account at the
13 institution and the net deposits in the applicant's account for the six months prior to the date of
14 submission of the application." LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been
15 at the institution for less than six months, "the certificate must show the account's activity for
16 this shortened period." LSR 1-2.

17 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount
18 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an
19 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly
20 deposits or the average monthly balance for the six-month period immediately preceding the
21 filing of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid,
22 the prisoner is required to make monthly payments equal to 20 percent of the preceding month's
23 income credited to the prisoner's account. 28 U.S.C. § 1915(b)(2). The agency that has custody

1 of the prisoner will forward payments from the prisoner's account to the court clerk each time
2 the account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

3 Plaintiff's certified account statement indicates that his average monthly balance for the
4 last six months was \$0.03, and his average monthly deposits were \$0.03.

5 Plaintiff's application to proceed IFP should be granted. In light of his \$0.03 average
6 balance and deposits, he should not be required to pay an initial partial filing fee; however,
7 whenever his prison account exceeds \$10, he must make monthly payments in the amount of 20
8 percent of the preceding month's income credited to his account until the \$350 filing fee is paid.

9 II. SCREENING

10 **A. Standard**

11 Under the statute governing IFP proceedings, "the court shall dismiss the case at any time
12 if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal--
13 (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii)
14 seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.
15 § 1915(e)(2)(A), (B)(i)-(iii).

16 In addition, under 28 U.S.C. § 1915A, "[t]he court shall review, before docketing, if
17 feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in
18 which a prisoner seeks redress from a governmental entity or officer or employee of a
19 governmental entity." 28 U.S.C. § 1915A(a). In conducting this review, the court "shall identify
20 cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--
21 (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks
22 monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b)(1)-(2).

1 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
2 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and
3 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a
4 complaint under these statutes, the court applies the same standard as is applied under Rule
5 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule
6 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232
7 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

8 The court must accept as true the allegations, construe the pleadings in the light most
9 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*,
10 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less
11 stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9
12 (1980) (internal quotation marks and citation omitted).

13 A complaint must contain more than a "formulaic recitation of the elements of a cause of
14 action," it must contain factual allegations sufficient to "raise a right to relief above the
15 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading
16 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]
17 a legally cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a
18 plaintiff should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at
19 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

20 A dismissal should not be without leave to amend unless it is clear from the face of the
21 complaint that the action is frivolous and could not be amended to state a federal claim, or the
22 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
23 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

1 **B. Plaintiff's Complaint**

2 Plaintiff sues John Doe Nugget Casino Owners and Nugget Casino employee Dallas
3 Johnson under 42 U.S.C. § 1983 for violations of his rights under the Eighth and Fourteenth
4 Amendments, for conspiracy, as well as for negligence under Nevada law.

5 Plaintiff alleges that he was charged and convicted of murder, attempted murder and
6 various lesser charges in 2019. He was sentenced and is currently housed in Ely State Prison
7 (ESP). Plaintiff avers that the Nugget Casino in Fallon, Nevada, is where the underlying event
8 took place. Dallas Johnson was an employee of the Nugget Casino and was supervised by the
9 casino's owners. He claims that they entered into a conspiracy to tamper with the time on
10 security cameras located within the casino in order to have Plaintiff convicted. He claims that
11 Johnson presented false testimony on this issue at his trial, and the casino owners suppressed key
12 information which would have changed the outcome of Plaintiff's trial.

13 § 1983 “‘is not itself a source of substantive rights,’ but merely provides ‘a method for
14 vindicating federal rights elsewhere conferred.’” *Graham v. Connor*, 490 U.S. 386, 393-94
15 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979)). To obtain relief pursuant to
16 section 1983, a plaintiff must establish a “(1) a violation of rights protected by the Constitution
17 or created by federal statute, (2) proximately caused (3) by conduct of a ‘person’ (4) acting under
18 color of state law.” *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).

19 The complaint explicitly acknowledges that the actions were taken by private individuals
20 working in a business (the Nugget Casino). Therefore, there is no state action and the section
21 1983 claims against the Defendants should be dismissed with prejudice. There is no basis for the
22 court to exercise jurisdiction over the remaining negligence claim; therefore, the negligence
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1 claim should be dismissed, though the dismissal should be without prejudice so Plaintiff may
2 bring the claim in State court, if he desires.

3 In light of these recommendations, Plaintiff's motion for appointment of counsel should
4 be denied as moot.

5 **III. RECOMMENDATION**

6 IT IS HEREBY RECOMMENDED that the District Judge enter an order:

7 (1) **GRANTING** Plaintiff's IFP application (ECF No. 3). Plaintiff should not be required
8 to pay an initial partial filing fee; however, whenever his prison account exceeds \$10, he
9 is required to make monthly payments in the amount of 20 percent of the preceding
10 month's income credited to his account until the full \$350 filing fee is paid. This is
11 required even if the action is dismissed, or is otherwise unsuccessful. The Clerk should be
12 directed to **SEND** a copy of an order adopting and accepting this Report and
13 Recommendation to the attention of **Chief of Inmate Services for the Nevada**
14 **Department of Corrections**, P.O. Box 7011, Carson City, Nevada 89702.

15 (2) The complaint (ECF No. 1-1) should be **FILED**.

16 (3) The section 1983 claims should be **DISMISSED WITH PREJUDICE**; the
17 negligence claim should be **DISMISSED WITHOUT PREJUDICE** so Plaintiff may raise the
18 claim in State court, if he desires; and this action should be closed.

19 (4) The motion for appointment of counsel (ECF No. 4) should be **DENIED AS MOOT**.

20 Plaintiff should be aware of the following:

21 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
22 this Report and Recommendation within fourteen days of being served with a copy of the Report
23 and Recommendation. These objections should be titled "Objections to Magistrate Judge's

1 Report and Recommendation” and should be accompanied by points and authorities for
2 consideration by the district judge.

3 2. That this Report and Recommendation is not an appealable order and that any notice of
4 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
5 until entry of judgment by the district court.

6
7 Dated: April 8, 2021

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William G. Cobb
United States Magistrate Judge